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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 621

ANNA PREISLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 31a-32a) is not yet reported. The opinion of the District Court appears at page 27a of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1956 (R. 33a). A petition for rehearing was denied on December 5, 1956 (R. 74a). The petition for a writ of certiorari was filed on December 10, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the finding by the two courts below that petitioner failed to establish the prerequisite of "good moral character" required under Section 101(f) of the Immigration and Nationality Act of 1952 for a grant of naturalization.

STATUTE INVOLVED

8 U.S.C. 1101(f) reads in pertinent part:

> No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was—
>
> * * * * *
>
> (2) One who during such period has committed adultery.
>
> * * * * *
>
> The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Second Circuit (R. 31a-32a), affirming the judgment of the District Court for the Southern District of New York (R. 27a), denying her petition for citizenship on the ground that she failed to sustain "the burden * * * of establishing good moral character during the period required by law" (R. 27a).

The evidence adduced at the preliminary hearing

before the naturalization examiner may be summarized as follows:[1]

Petitioner, of Polish birth, arrived in the United States with her husband and minor son on September 28, 1949, and took up residence in Jamaica, Long Island (H. 42, 63). Marital difficulties developed soon thereafter and led to a test separation in the fall of 1951 (H. 13, 65-66). Petitioner went to Reading, Pennsylvania, and the child remained with his father (H. 43, 66). Petitioner returned to her husband around Easter of 1952 (H. 44, 67). Six months later she gave birth to a daughter (H. 46, 67). Petitioner testified that her physician advised her that the child was a six-month baby (H. 67); she further stated that her husband was its father (H. 67). Her husband testified that he did not know whether he was the father of the child and that he had not taken any legal action to determine the paternity issue (H. 46-47). In March 1953, petitioner's husband was hospitalized with silicosis (H. 45, 67-68). In December 1953, just prior to his release, petitioner moved to 412 West End Avenue, New York City (H. 47, 68). Her two children had previously been boarded out (H. 48, 68-69). After his release from the hospital, her husband resided with her for a short time, during January 1954, at this apartment (H. 48-49, 69). They thereafter separated and have been apart ever since (H. 69). At present, the older child resides with petitioner's husband, while the younger one is boarded out (H. 24, 51, 59, 74).

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[1] Filed herewith is a photostatic copy of the Government's Exhibits 1 and 4. Exhibit 4 consists of the transcripts of testimony taken before the naturalization examiner. Exhibit 1 consists of a summary of this testimony and the recommendation of the Immigration and Naturalization Service that the petition for naturalization be denied. Exhibit 4 is designated as "H" in this brief.

Within a week after her arrival in the United States, petitioner communicated with one Joseph Wachtel (H. 10-11, 70). She saw and telephoned him quite often without her husband's knowledge and without introducing Wachtel to him (H. 11, 36, 70). Once or twice, Wachtel came to visit her at her Jamaica home while her husband was hospitalized, purportedly to bring medicine for her child (H. 11). According to both petitioner and Wachtel, he was a good friend of her father and had first met petitioner in Poland when she was a child of 8 (H. 11-12, 23, 70). After petitioner's separation from her husband early in 1954, she shared her apartment at 412 West End Avenue with one Sofie Ilson, an unmarried woman friend (H. 14, 71). The lease for this apartment was obtained by Joseph Wachtel, in his own name, purportedly because neither petitioner nor her friend had the financial background to procure a lease (H. 14, 71). Wachtel visited petitioner at the apartment about once a month, but never slept over (H. 72).

In April 1954, petitioner was employed by Wachtel as an assistant research consultant on a part time basis at $50 per week (H. 15). As of September 1, 1954, she was employed full time and her salary was raised to $100 per week (H. 15). Wachtel is currently a research consultant experimenting with a poultry antivirus product and has an extensive background of scientific experience (H. 15-16, 22-23). Prior to being employed by Wachtel, petitioner, at various times, was a factory worker, a model, and a magician's assistant (H. 15, 64). As a young girl in Poland, she studied chemistry for about six months (H. 15, 72). Wachtel explained that he had spent some time training petitioner for the work she is doing as his assistant (H. 15).

In January 1955, again under a lease procured and signed by Wachtel, petitioner and Sofie Ilson moved to a six-room apartment located at 522 West End Avenue, New York City (H. 18, 72). The two women each pay Wachtel $60 per month as their share of the $187 per month rent (H. 18-19, 72). This apartment contains two bedrooms, three bathrooms, a living room and a dining room (H. 19, 73). In addition to being used as a residence by petitioner and Miss Ilson, the dining room is used daily by Wachtel and petitioner for their scientific work (H. 19, 21-22, 31, 73-75). Two or three times a week, allegedly because the experiments require his constant attention, Wachtel remains overnight at the apartment (H. 21, 73, 83-84). His own apartment, in which he resides with his wife, is six blocks away (H. 83-84). Wachtel's wife never met petitioner, never knew of his social meetings with petitioner, nor of their business arrangement (H. 26, 37, 71, 73-74). The name "Wachtel" is the only one posted as tenant for the apartment occupied by petitioner and Miss Ilson (H. 19). The superintendent of the building had been under the impression that petitioner and Wachtel were married (H. 20). Wachtel agreed that, due to the fact that he signed the lease and was a frequent visitor to the apartment, such an assumption was reasonable (H. 20).

Petitioner and Wachtel took several trips together, ostensibly in connection with their work (H. 25-27, 75-76). They spent several days in Canada, a weekend in Washington, D. C. and Arlington, Virginia, and took an overnight trip to Maryland (H. 25, 27, 76-77). Both petitioner and Wachtel denied that any unlawful intimacy either was the cause of their constant association or resulted therefrom (H. 23, 27, 73).

During her relationship with Wachtel, petitioner borrowed sums from him totalling $1,000, as has Miss Ilson (H. 24, 75). At present, petitioner owes him $500 (H. 24, 75). Her salary is paid by Wachtel from his personal funds from which he does not subtract withholding tax (H. 16-17, 76).

Wachtel and one Arthur Jacob, to whom petitioner had been introduced by Wachtel soon after her arrival in the United States (H. 78), were the verifying witnesses to her petition for naturalization.

After consideration of the evidence adduced during the preliminary examination, the naturalization examiner recommended that the petition be denied on the ground that petitioner had failed to establish good moral character during the period required by law (Ex. 1; 5-7, R. 28a).

At the hearing before the District Court, petitioner and Wachtel repeated their version of their relationship, claiming that it never involved any sexual misconduct, and that their constant association was readily explainable if examined in the light of their scientific work (R. 7a-13a, 14a-15a). Miss Ilson testified that Wachtel had slept at the apartment on various occasions, and that she never saw his wife at the apartment (R. 13a-14a). In denying the petition for naturalization, the District Court held (R. 27a):

> After prolonged consideration of the record in this matter, I believe the petition should be denied. The petitioner has not, in my opinion, sustained the burden incumbent upon her of establishing good moral character during the period required by law.

The Court of Appeals affirmed this finding and conclusion as "the most favorable view towards [petitioner] which the record permits * * *." (R. 32a)

ARGUMENT

The evidence in the record amply supports the conclusion of the courts below that petitioner has not borne her burden of showing that her relationship with Wachtel, a married man of 38, was an innocent bond between benefactor and ward dictated by the singular requirements of the scientific research upon which they were engaged. To the contrary, petitioner's association with Wachtel contains so many unexplained compromising facets as to warrant the inference that it was tainted with overtones of improper intimacy.

Petitioner argues (Pet. 7-10) that such a conclusion is patently erroneous, on the ground that the record would not sustain an adultery conviction and does not show specific acts of illegal intimacy on her part.[2] This contention has no substance. The denial of the peti-

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[2] Petitioner also challenges (Pet. 10-11), as improper, consideration by the lower courts of the testimony adduced before the naturalization officer at the preliminary examination. She claims that the decision must be based solely on evidence given in open court, and relies upon language to that effect in *Application of Murra*, 178 F. 2d 670, 671 (C.A. 7). This contention is without merit. The 1952 Act specifically provides that the record of the preliminary examination "* * * shall be admissible as evidence in any final hearing conducted by a naturalization court * * *" 8 U.S.C. 1446 (b). Moreover, the court shall have before it the recommendation of the examiner. 8 U.S.C. 1446(d). In addition to the fact that *Murra*, unlike the instant case, was decided under the 1940 Act, its rationale was subsequently limited by the Seventh Circuit to those situations where the petitioner demands that his application be "determined from the testimony of witnesses heard before and in the presence of the court." *Stevens* v. *United States*, 190 F. 2d 880, 882 (C.A. 7).

tion for citizenship was not necessarily based upon any single act of adultery but on the fact that petitioner's association with Wachtel revealed a course of improper conduct incompatible with "good moral character." And the naturalization court is limited neither by the precise requirements of the crime of adultery under a particular state law nor by the rules of proof applicable in criminal trials. Adultery in the criminal sense need not be shown; it is enough that the applicant's character and relationships are seen to be immoral or improper.

Moreover, in the light of the evidence petitioner cannot well claim that adultery was not found. Her complaint, essentially, is that her intimate association with Wachtel was implicitly, rather than explicitly, characterized in the judgment of the District Court as adulterous. The finding of an adulterous relationship was explicitly affirmed by the Court of Appeals when it held that the decision was properly a denial under Section 101(f)(2), *supra*, p. 2, making adultery a basis of denial (R. 31a-32a).

On either basis, the trial court's factual determination should remain undisturbed. *Stevens* v. *United States*, 190 F. 2d 880, 883 (C.A. 7); *Foon Goon Mok* v. *United States*, 186 F. 2d 922 (C.A. 9). As the trier of fact, "the court had the witnesses before it and was, of course, much better able to appraise the credibility of the witnesses in the factual setting * * *." *Flumerfelt* v. *United States*, 230 F. 2d 870, 871 (C.A. 9). The Court of Appeals noted that the decision of the District Court was "the most favorable view towards [petitioner] which the record permits" (R. 32a). This comment comes from a court that has declined to find lack of

"good moral character" except upon the clearest evidence. See, *e.g.*, *Johnson* v. *United States*, 186 F. 2d 588; *Schmidt* v. *United States*, 177 F. 2d 450; *Daddona* v. *United States*, 170 F. 2d 964; *Repouille* v. *United States*, 165 F. 2d 152; *Petitions of Rudder*, 159 F. 2d 695; *Estrin* v. *United States*, 80 F. 2d 105. The short of it is that, despite the favorable assertions of petitioner's verifying witnesses, one of whom was Joseph Wachtel, the evidence in totality fails to support petitioner's contention (Pet. 10) that she has sustained the burden of establishing good moral character. Cf. *Ralich* v. *United States*, 185 F. 2d 784, 787 (C.A. 8).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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